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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-503

BILLY D. COOK, ET AL., *Petitioners*

v.

ROGER W. HUDSON, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS & POLICY	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	21
ARGUMENT	
I. The Right in Issue	22
II. The Policy, As Written and Applied, is Overbroad	23
III. Under This Court's Decision in *Pickering* Petitioners' Loss of Employment is Unconstitutional	30
IV. The Policy is a Per Se Violation of First Amendment Rights	40
CONCLUSION	53

AUTHORITIES CITED

CASES:

Adler v. *Board of Educ.*, 342 U.S. 485 ..... 40, 41, 42, 47, 48, 50, 51
Baird v. *Arizona*, 401 U.S. 1 51
Banks v. *Muncie Community Schools*, 433 F.2d 292 (7th Cir. 1970) 34
Blackburn v. *Alabama*, 361 U.S. 199 3
Bryan v. *Austin*, 148 F.Supp. 563 (E.D.S.C. 1957) .. 49, 50
Cleveland Bd. of Educ. v. *LaFleur*, 414 U.S. 632 .. 33, 36, 53
Elrod v. *Burns*, 44 U.S.L.W. 5091 (U.S. June 28, 1976) 21, 35, 37, 42, 43, 44, 45, 46, 52
Erzoznick v. *City of Jacksonville*, 422 U.S. 205 29
Green v. *Connally*, 330 F.Supp. 1150 (D.D.C. 1971) ... 3

Page

Healy v. *James*, 408 U.S. 169 ..... 32, 33, 39
Johnson v. *Branch*, 364 F.2d 177 (4th Cir. 1966) 50
Keckeisen v. *Independent School Dist.*, 509 F.2d 1062 (8th Cir. 1975) 37
Kelley v. *Johnson*, 96 S.Ct. 1440 ..... 30, 31
Kejishian v. *Board of Regents*, 385 U.S. 589 ..... 40, 41, 42, 45, 47
Law Students Civil Rights Research Council, Inc. v. *Wadmond*, 401 U.S. 154 51
Los Angeles Teachers Union v. *Los Angeles Bd. of Educ.*, 71 Cal.2d 551, 445 P.2d 827, 78 Cal. Reptr. 723 (1969) 38
McCarthy v. *Philadelphia Civil Serv. Comm'n*, 96 S.Ct. 1154 30
McLaughlin v. *Tilendis*, 398 F.2d 287 (7th Cir. 1968).. 27
NAACP v. *Alabama*, 357 U.S. 449 22
Norwood v. *Harrison*, 413 U.S. 455 3
Paris Adult Theater I v. *Slayton*, 413 U.S. 49 38
Perry v. *Sindermann*, 408 U.S. 593 ..... 41, 42
Pickering v. *Board of Educ.*, 391 U.S. 563 ..... 3, 21, 27, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 50
Pierce v. *Society of Sisters*, 268 U.S. 510 ..... 22, 27, 53
Rackley v. *School Dist. No. 5*, 258 F.Supp. 676 (D.S.C. 1966) 50
Roe v. *Wade*, 410 U.S. 113 22
Runyon v. *McCrary*, 44 U.S.L.W. 5034 (U.S. June 25, 1976) 21, 22, 23, 53
Shapiro v. *Thompson*, 394 U.S. 618 53
Shelton v. *McKinley*, 174 F.Supp. 351 (E.D. Ark. 1959) 47, 48, 49, 50
Shelton v. *Tucker*, 364 U.S. 479 ..... 50,51, 52
Smith v. *St. Tammany Parish School Bd.*, 448 F.2d 414 (5th Cir. 1971) 34
Stanley v. *Illinois*, 450 U.S. 645 33
Tinker v. *Des Moines Independent School Dist.*, 393 U.S. 503 ..... 3, 32, 35, 36, 39, 50

Page

United Public Workers v. *Mitchell*, 330 U.S. 75 35
United States v. *Calhoun County Bd. of Educ.*, No. W.C. 6637 (N.D. Miss. 1968) 4
United States Civil Serv. Comm'n v. *National Ass'n of Letter Carriers*, 413 U.S. 548 35
Wardell v. *Board of Educ.*, 529 F.2d 625 (6th Cir. 1976) 30
West Virginia State Bd. of Educ. v. *Barnette*, 319 U.S. 624 ..... 25, 26
Wieman v. *Updegraf*, 344 U.S. 183 48
Williams v. *Sumter School Dist. No. 2*, 255 F.Supp. 397 (D.S.C. 1966) 50
Young v. *American Mini Theaters, Inc.*, 44 U.S.L.W. 4999 (U.S. June 24, 1976) 28, 29

STATUTES:

MISS. CODE ANN. § 37-9-17 (1972) 5

28 U.S.C. § 1254(1) 2

SECONDARY AUTHORITY:

BEALE, A HISTORY OF TEACHING IN AMERICAN SCHOOLS (1941) 27

Davidson & Land, *Children's Perception of Their Teachers' Feelings Toward Them Related to Self-Perception, School, Achievement & Behavior*, 29 J. EXPERIMENTAL EDUC. 107 39

Developments in the Law, *Academic Freedom*, 81 HARV. L. REV. 1045 (1968) 47

C. JENCKS, INEQUALITY (1972) 39

S. Koslin, B. Koslin & R. Paragament, *Efficacy of School Integration Policies in Reducing Racial Polarization*, Paper presented at the American Psychological Association, Honolulu, Hawaii, Sept. 1972 39

Page

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UNITED STATES DEPT. OF HEALTH, EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY, OFFICE OF EDUCATION, 2 COLEMAN REPORT (1966) (Supplemental index) 39

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 511 F.2d 744. The denial of rehearing en banc appears at 515 F.2d 762. The opinion of the United States District Court for the Northern District of Mississippi is reported at 365 F. Supp. 855.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 21, 1975. A timely petition for rehearing en banc was denied on July 3, 1975 and the petition for certiorari was filed October 3,

1975 and was granted on March 1, 1976. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND POLICY

United States Constitution—First Amendment: Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

United States Constitution—14th Amendment: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Policy: Calhoun County Board of Education: [P]rior to the employment of a new teacher or the re-employment of an existing teacher, if the children of any such teacher, if living in Calhoun County, Mississippi, [do] not attend the public schools of said Calhoun County, or if the children of any such teacher, if living outside of Calhoun County, [do] not attend public schools, said teacher would not be employed or re-employed.

QUESTION PRESENTED

Whether, consistent with the First and Fourteenth Amendments, a public school board may terminate the employment of all teachers not sending their children to public schools.

STATEMENT OF THE CASE[1]

Calhoun County, Mississippi, has a county-wide public school system. Within the confines of the system is the Calhoun City Attendance Center, a public school in which petitioners were employed as teachers. Calhoun Academy, a private, segregated facility established in 1968,[2] is also located in the county. This setting gave rise to the instant case involving the constitutional ramifications of a decision to terminate the employment of some public school teachers in the county pursuant to an unwritten policy adopted by the Calhoun County School Board in November of 1972, providing:

> [P]rior to the employment of a new teacher or the re-employment of an existing teacher, if the children of any such teacher, if living in Calhoun County, Mississippi, [do] not attend the public schools of said Calhoun County, or if the children of any such teacher, if living outside of Calhoun County, [do] not attend public schools, said teacher would not be employed or re-employed. [A. 298]

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[1] With the curtailment of a First Amendment right, a detailed statement is in order. Tinker v. Des Moines Community School Dist., 393 U.S. 503, 509; Pickering v. Board of Educ., 391 U.S. 563; Blackburn v. Alabama, 361 U.S. 199, 205 n.5 ("[W]e cannot escape the responsibility of scrutinizing the record.").

[2] The Academy has received some financial support from the Citizens Council, a group purportedly supporting states' rights and racial integrity. There is little question of this group's purpose. *See* A. 328-35 (solicitation of funds); A. 406-17 (rather outdated articles concerning political and social philosophy). Because of the failure of the Academy to adopt racially nondiscriminatory admission policies, it no longer has tax exempt status under Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom.*, Coit v. Green, 404 U.S. 997, or access to free textbooks under this Court's holding in Norwood v. Harrison, 413 U.S. 455.

A. History of the Policy

The Calhoun County School System was desegregated in 1968. *United States* v. *Calhoun County Board of Education,* No. W.C. 6637 (N.D. Miss. 1968). At some point in the following year the then defendant board began discussions of the policy in its present form.[3] Additional impetus for its passage was initiated in February of 1972 when John Burt, the newly-elected (A. 140) superintendent of the Calhoun County School, again recommended it. (A. 151) Working from the basic premise that a "private school [was not needed] in Calhoun County," (A. 161) Mr. Burt testified that at the time he had two objectives in mind: compliance with the court desegregation order[4] and securing the "needed total cooperation and dedication from all people concerned with the public schools." (A. 141) Specifically:

> I personally feel [that sending a child to private school] does affect the teacher in carrying on the performance that should be expected—that we are expecting of *all* teachers and the efficiencies in their job. [A. 141 (Emphasis added.)]

Roger Hudson, principal of the Attendance Center, assumed his position on July 1, 1972, (A. 33) and, aware of the fact that the school board was "knocking around" Burt's proposal, (A. 31) proceeded to tell his teachers, including petitioners, that the policy was

[3] R. W. Mallory, president of the board, testified that prior to its passage in 1972 such a policy had been "discussed" and "in the school board's mind" for 2 or 3 years. (A. 211, 232)

[4] United States v. Calhoun County Bd. of Educ., No. W.C. 6637 (N.D. Miss. 1968). (A 382) The order does not contain any mandate limiting the right of white teachers to send their children elsewhere for an education.

applicable to them irrespective of board action. (A. 31-32) The effect of this action was that all teachers would be maintained in their present status throughout the 1972-1973 school year; pursuant to Hudson's authority under state law,[5] those violating the policy would not be rehired after that period. The basis for this independent decision was an assumption that "a teacher who teaches in a public school system ought to be required to send their children to the public schools . . . ." (A. 36) Tracking the reasoning previously utilized by John Burt, Hudson's testimony set forth two independent objectives: (1) promoting a unitary school system; and (2) precluding "divided loyalties" and therefore promoting efficiency and productivity. (A. 27)

Hudson's interpretation of the now-implemented policy stressed the second foundation for its passage and tracked its literal language (as subsequently passed). He testified it applied to both black and white teachers (A. 18) and that there were to be no exceptions, that is, it was "absolute and inviolate." (A. 25) Specifically, *any* teacher sending his or her child to *any* private school, including those of a religious denomination, (A. 25-26, 39) would be terminated. Hudson's testimony pinpointed striking examples of his approach in "faithfully carry[ing] out the policy" as he perceived it. (A. 18)

[5] "On or before April 1st of each year, the principal of each school shall recommend to the superintendent . . . the teachers to be employed . . . ." Miss. Code Ann. § 37-9-17 (1972). Hudson testified that the understanding of this provision was that his recommendations would be accepted unless "good cause" existed to the contrary. (A. 17) Apparently, there was authority, absent board action, for Hudson to implement such a policy on his own. *See* A. 231.

Mr. and Mrs. Enochs were black teachers employed by Mr. Hudson who placed their child in a school located in Atlanta, Georgia. (A. 19) Only after Hudson sent for and reviewed the records of that school in order to make the determination that it was a "public" institution was the continued employment of the Enochs approved. (A. 20)

Mr. Hamblin, also a teacher at the Calhoun City Attendance Center, has children with hearing problems. As a result of this defect, he sent them to the Magnolia School for the Deaf in Jackson. (A. 24) Hudson testified that Hamblin's reemployment was based on the fact that the facility was "public." (A. 23-24) This issue, however, was not finally resolved until the matter reached the Superintendent, John Burt. Burt testified that Hamblin's hiring was approved only after he determined that although it employed a tuition requirement, Magnolia had access to state and federal funds. (A. 155-59)[6]

This literal application of the policy was *stipulated* as correct by opposing counsel:

> We have agreed to the policy stated. It's simply that the children of a teacher that lives in Calhoun County and teaches in the public school system, *if they do not send their children to the public schools,* they will not be recommended for re-employment. [A. 32 (Emphasis added.)]

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[6] It should be noted, although the record is not clear on the point, that the situation of the Enochs and Mr. Hamblin apparently reflect implementation of the second portion of the policy, *i.e.*, a teacher living *outside* Calhoun County was under mandate to send his or her child to the "public schools," while teachers living within the county were under mandate to send their children to the public schools *in the county*.

While Hudson was implementing the policy independently of the school board, Paul Moore, the attorney for the board, wrote the Department of Justice concerning the advisability of board action on the matter. His reason for requesting advice was:

> The situation is that we have learned since entering into contracts with certain of the teachers in the School District, *that they have children that they are sending to private schools.* [A. 392 (Emphasis added.)]

Indicating a threatened suit by a "verbal" lawyer-husband of one of the teachers located elsewhere in the county, (A. 392) Moore continued by stating that *he had* "advised the board that in my opinion we were under an obligation to do all affirmatively necessary to advance integration, and that in my opinion their action was correct." (A. 392) Continuing, he described the attitude of the school authorities:

> *The board* also feels that our faculty members should be dedicated to the public school program, and also that their sending children to the private school is indicative of the fact that they do not feel that they are operating the school system adequate for their own children. [A. 392 (Emphasis added.)]

Responding, the Department of Justice alluded not to the "dedication" aspect of the policy, nor the fact that the letter indicated an additional objective of denying teachers the right to send their children to *any* private school, but referred instead to this Court's pronouncements on the necessity of taking "positive and affirmative steps" in promoting a unitary system. In this context, the measure was approved as a tech-

nique to eliminate discrimination "root and branch." (A. 403) There was, however, a qualification: "The comments made above do not purport to answer any 'due process' or 'First Amendment' issues which may be raised in this matter." (A. 403) In November of 1972, the policy was adopted by the board. (A. 18, 31, 151)

The board president, R. W. Mallory, (A. 187) testified as to what he considered the scope and motivating factors behind this decision. Stating that it was to be a "blanket policy," (A. 188) he testified that if a "teacher had a kid in [any] private school they wouldn't be re-hired." (A. 189) Mallory did, however, indicate concern with the presence of Calhoun Academy in the county because "[t]hat's where these kids were going."[7] (A. 190)

Pursuant to a motion by respondents for further testimony on the segregated status of Calhoun Academy, District Judge Keady reopened the case. (A. 302, 306-07) Admitted into evidence was additional testimony on the "background" of the board's policy. (A. 199) Mallory, taking the stand once again, noted at the time the policy was adopted there were eight teachers involved.[8] He again stressed the need for dedication:

> Well, this is like we already brought out, that we didn't say in this Calhoun County, [*sic*] maybe

[7] This obviously conflicts with the letter by the board's attorney to the Department of Justice stating that teachers were sending their children to various private schools. (A. 392)

[8] This reference, of course, is to the entire system. The Attendance Center employed 65 to 70 teachers (A. 23) of which two had decided to send their children to private school. (A. 36)

> that's because that's where they work, would be dedicated to the public school system. [A. 199-200]

Referring to the "hard prejudice" demonstrated by those attending the private school when it initially opened, he stated:

> Of course, it may not be as bad, but some of that is still going to carry through for these teachers that have kids. Now, that's what we thought. That's our thinking on it. [A. 201]

Reference was then made to some vague complaints (A. 201) concerning unnamed teachers in the system who had their children in private school. (A. 217) These were characterized by Mr. Mallory in the following fashion: "[Y]ou would hear a parent say the kid wanted to know why so-and-so was her teacher and her kid was in a private school, you know." (A. 217) Although he admitted knowing "everybody" in his district, (A. 227-28) the only persons he identified as making a complaint of this type were the parents of the "Simpson kids," (A. 228-29) *i.e.*, the parents told him what their children allegedly said.

Additional comments were elicited from Mr. Mallory by attorneys for the board relating to that portion of his previous testimony indicating board concern with Calhoun Academy. This time he stressed the impact of its presence, (A. 218) as graphically demonstrated by the introduction into evidence of a significant number of local newspaper accounts detailing Citizens Council activities related to fund raising for the Academy. (A. 219-22)

At this point in the proceeding the intent of the policy was described as "limited" to Calhoun Acad-

emy.' Immediately thereafter, the following dialogue between respondents' counsel and the witness took place:

> Q *And with reference to a child that was deaf or dumb attended,* say, a school of—
>
> A *Well, that would be totally different.* I mean, as far as we were concerned. *Because the biggest concern we had was,* of course, like we said, that these—*if the teacher has got a kid in one school they are bound to have, you know, some loyalty to that school . . . [I]t was our opinion that they wouldn't be as fully dedicated to the school system. That was our basis for forming the policy.* [A. 215 (Emphasis added.)]

On cross-examination:

> Q All right. Then why . . . do you adopt a policy that says, "If you want to teach in this public school you have got to send your children there rather than to a private school"?
>
> A You—if a teacher is going to teach in our school, *if they are going to have their full interest in teaching, their kids are going to be there, too.* That's our opinion. *That's what we based this on.* [A. 226 (Emphasis added.)]

And again:

> Q Then why do you put a restriction on these teachers earning a livelihood and say, "If you don't send your children to public schools then you can't teach there"?
>
> A Because it's our opinion that they are not going to be as dedicated as a teacher should be. [A. 230 (Emphasis added.) *See also* A. 225]

Subsequently, Mallory again referred to his understanding that the policy, as passed, was to be a "blanket policy," extending beyond the Calhoun Academy situation. (A. 232) Laying aside the policy's previous history, Mallory concluded by pointing to the "need" for board passage in the context of "backing [Roger Hudson] up in his decision." (A. 232)

After passage of the policy[10] and subsequent to a determination that petitioners intended to abide by their decision to continue the education of their children at the Academy, they were not reemployed for the 1973-1974 academic year. This decision resulted in the initiation of the instant litigation in the Northern District of Mississippi. It was at this point that the school board, in support of its policy, began to develop an after-the-fact record. As finalized, it encompassed two areas: (1) "expert" testimony from educational psychologists favoring the policy; and (2) circumstantial evidence bearing on the motives of petitioners in sending their children to the private academy.

B. Expert Testimony

Two educational psychologists from the University of Mississippi testified in support of the board's policy. At this point in the proceedings the scope and intent of

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[9] Pursuant to questions by counsel for respondent concerning what facility he had "in mind," Mallory responded: "Well, this was Calhoun—of course, Calhoun Academy was the only facility in the county other than public school." (A. 214) District Judge Keady followed up on this response by inquiring about the "intent." The response: "Well, that was the intent, because that was the only school involved, you know." (A. 214-15)

[10] The record is clear that once the oral policy was passed all teachers "got the word . . . within the next day or two." (A. 213)

the policy as understood by all parties was *again* cemented when counsel for respondent objected to its phrasing by petitioners' attorney on the ground that "he didn't state the policy correctly." (A. 134) This, in turn, led to a rephrasing and the agreed interpretation, as posed to one of respondents' experts:

> Q Doctor, is a policy requiring a teacher who teaches in the Calhoun County System to send their children to a public school or otherwise not be hired or employed, is that a sound educational policy? [A. 135-36]

Focusing on the need for "dedication" on the part of all public school teachers and its favorable impact on teacher performance, the broad applicability of the policy to *all teachers* and *any private school* was assumed at the initial stage of direct examination.[11] The question was posed to Dr. Eicke, the first expert, as to why the policy—pursuant to its literal wording—was "reasonably and significantly related to job performance." (A. 99) He responded:

[11] During the entire span of Dr. Eicke's testimony there were only three minor instances where specific reference was made to the appropriateness of the policy in the context of a unitary school system. At one point he concluded a generalized commentary on reinforcement with the statement: "I think this would be particularly true with the black students." (A. 100) At another point, District Judge Keady requested an expert to "modify" his response to the sending of a child to "a private school that is all white." (A. 104) Dr. Eicke responded that students in Mississippi were "well aware of individuals within the community who support the kind of academies that have come about in recent years." (A. 104) Finally, he noted the policy's "reasonableness" in the context of "integration academies." (A. 105) Dr. Harlan, the second witness, referred on cross-examination to the need for support of a court-ordered unitary school system and his understanding that the policy was "related to . . . carrying out that particular court order and to establish a single unitary school system." (A. 130)

> [A] teacher sending children to a [any] private school would be evidencing a rejection of the public school system and this would set up certain kinds of variables operating.
>
> . . . I think the students would perceive this rejection and as a result would react to the teacher in a different kind of way than if they perceived the teacher as *totally* committed to the educational system. [A. 100 (Emphasis added.)]

Dr. Eicke then proceeded to testify with reference to perceived adverse consequences to *all students:*

> Q Doctor Eicke, would a [any] student perceive a teacher who sent their own children to a [any] private school—a public school student, would this be perceived as a negative social reinforcement?
>
> A I think it would. [A. 101]

After explaining the ramifications of "negative social reinforcement:"[12]

> Q Doctor, . . . what, if anything, would be the effect of a low teacher expectation on a student?
>
> A It's pretty clear that it's lower achievement on the part of students. [A. 103]

On cross-examination the expert's thoughts on the issue crystalized. After being given the opportunity to detail adverse consequences flowing from education in a private, parochial school based on his personal experience of being educated in a Catholic school, (A. 105-07) Dr. Eicke was asked:

[12] [A]n operational principle in psychology that holds that a teacher, by such things as paying attention to students, showing respect, trust, acceptance, has the *potential* for increasing or having a positive effect on learning. [A. 101 (Emphasis added.)]

Q Let's talk about your psychology. Do you think that it is wrong for a person to go to a parochial or to a church-related school?

. . . .

A Not any person. I think if a teacher were teaching the public schools [*sic*] that that involves another kind of commitment.

Q All right.

Let's assume that teachers in the State of Mississippi and in the universities, high schools and grammar schools teach in the public schools. *Do you tell this Court that in your position that they should send their children to a public school?*

A Yes. [A. 108 (Emphasis added.)]

. . . .

Q . . . [W]hat's wrong with parents sending their children to those [church-related] schools?

A Inherently, nothing. *Except for the fact that it raises certain conflict of interest ideas.*

Q All right.

Now let's talk a little bit about conflicts of interest. In other words, if I understand your testimony, if a teacher is securing money from a state-supported school, that teacher owes the state the obligation of sending his or her children to the public schools. Is that your—

A Yeah, if they are committed to public education, I think you should.

Q All right. So, then, every teacher who is being paid by the State of Mississippi owes an obligation to send his or her child to a public school. Is that what you are telling us?

A That would be my personal opinion, yes.

. . . .

Q All right. *Let's go to the national level.* Do you think that every person who is receiving a salary from the Federal Government in any school-related activity owes the Federal Government the obligation of sending his or her child to a public school?

. . . .

A My thinking on that is that as long as the public schools can meet the needs of the kids that are involved—

Q That they should do that?

A Yes.

. . . .

. . . I think a person who teaches in the public schools should be committed to the public schools. [A. 109-10 (Emphasis added.)]

On direct examination the second expert witness, Dr. Harlan, proceeded in the same vein. He found the policy "reasonable" inasmuch as it was related to "job performance." (A. 118) Utilizing studies he had made in another part of the state on "poor achievers" and "slow learners," (A. 121-22) as well as an article in *Psychology Today*[13] reviewing a number of studies exploring the effects of lowered teacher expectations on student achievement, counsel for respondent explored with Dr. Harlan the broad ramifications of the policy:

> Q Doctor Harlan, what, if anything, would a [any] student who is in a public school and whose teacher sends their own child to [any] private school, what would that student perceive, if anything, that would affect his learning?

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[13] Rosenthal, *The Pygmalion Effect Lives*, PSYCHOLOGY TODAY, Sept. 1973, at 56. (A. 376-81)

A Well, in my opinion, that would set up a system where other students would perceive or could perceive the teacher in a negative way, as not accepting that the public school was a good and viable place for their children to attend. [A. 123]

. . . .

Well, if the student is perceiving the teacher as negative and that it is not a viable place for your children to go, then that would have an effect on the student's achievement, he would not perceive it in a positive way and, therefore, *probably* would not achieve as well. [A. 124 (Emphasis added.)]

. . . .

. . . [I]f the entire teaching staff is committed to furthering the public education in that county, then the students have a better chance of being successful, achieving. [A. 125]

. . . .

Q Doctor Harlan, do you have an opinion as to what the expectation of a teacher would be who would send their child to a [any] private school while teaching in a public school with respect to the expectation of children in the public school?

A *I wouldn't have an opinion for any particular teacher. I would have to talk to the specific teacher on that.* But the general idea would be—my opinion would be that if you felt that public school was not good enough for your child, you would just have a negative feeling about the public school. You wouldn't think it was good enough for your child and, therefore, you have to send him to a private school. Seems like it would be putting the public school down. [A. 127 (Emphasis added.)]

On cross examination an admission that he knew nothing concerning petitioners' situation was elicited. (A. 128-30) Continuing:

Q . . . .

Then, Doctor, I would presume . . . that your opinion would be the same if I asked if a teacher were employed at the University of Mississippi, Mississippi State, Mississippi Southern, or any state-owned school, that that teacher teaching in a public school owes the state and the school system the duty and obligation of sending their child to a public school.

A Yes—

Q You are hesitating.

A Yes, that would be my opinion, that you should support public education if you are a public school employee. [A. 130]

Finally, the following interchange occurred:

Q Do you believe that a teacher employed in Calhoun County should be deprived of the right to send his or her child to a parochial school?

A If the policy stated in that county is as it is stated, then I think you should make a decision about whether or not you want to work there or not. [A. 133-34]

. . . .

Q Doctor, *is a policy requiring a teacher who teaches in the Calhoun County System to send their children to a public school* or otherwise not to be hired or employed, is that a sound educational policy?

A I think at this point in time it is, I would. [A. 134-35 (Emphasis added.)]

The testimony of petitioners, the only teachers determined to challenge the policy, completes the material portion of the record.

C. Petitioners

In proceedings before the District Court, it was stipulated:

> [T]hat the *only issue* before [the] court is whether or not the policy that [the school board] adopted was reasonable, or Constitutional, or violated the Constitutional rights of the plaintiffs . . . . [A. 7 (Emphasis added.)]

It was agreed that petitioners were competent (A. 226-27) and compatible with the school administration. There had been no complaints from students, parents, fellow faculty members, or the administration questioning petitioners' commitment or teaching ability. This status was maintained at all times prior to the adoption of the policy and in the remaining period of employment (November, 1972-June, 1973). As agreed, "the only reason that they were not employed was because their children attended private school." (not Calhoun Academy) (A. 6-7, 17, 137)

Thus, the case was stipulated for a determination of the constitutionality of the policy and the competence of petitioners was admitted. Considerable trial time, however, was spent in an extensive after-the-fact inquiry into petitioners' motivations, *i.e.*, the accumulation of circumstantial evidence which, presumably, could lead to a determination of whether petitioners' actions could be characterized either as "racist" or as a demonstrable lack of "dedication." The results of the inquiry are as follows:

(1) Billy Cook has 8 years of teaching experience and served as a teacher-coach at the Attendance Center. (A. 12, 61) He has a 7 year-old son, described as an "emotional, nervous, type," attending Calhoun Academy. As explained, he and his wife thought "an environment where there were smaller classes" would present a better learning atmosphere. (A. 62) Mr. Cook also indicated that he did not believe that the child should be placed in the same school in which he was teaching due to the potentiality for showing "partiality." (A. 63) On cross-examination, however, it became clear that, although there were no specialists at the private school, a speech therapist and a guidance counselor were available at the Attendance Center. (A. 78-79) In addition, it was elicited that Mr. Cook's new employment was as headmaster of the private academy and that his son remained in the same school. (A. 72, 76) Mr. Cook's explanation for the latter fact related to apparent problems with his son:

> [M]y child would be in jeopardy because I went to the private school. I don't mind telling you that.
>
> . . . .
>
> . . . I think if it was a different principle this whole question wouldn't have come up, wouldn't be a lawsuit. [A. 82]

Finally, when cross-examined concerning plans for placement of his 5 year-old daughter in school, he responded that, although he had made no plans, (A. 81) "I think that any parent has the right to send their child where they wish as long as it's paid for . . . ." (A. 80)

(2) Mrs. W. P. Wright has 8 years of teaching experience. (A. 84) She lives 5 miles from the public school (A. 84, 86) and within "walking distance" of the Academy. (A. 85) She has two children at the Academy and her stated reasons for sending her children to the private school were: smaller classes, more

individual attention, and a religious program.[14] (A. 85-86) Mrs. Wright further indicated that the children could not ride with her to the public school because of teachers' meetings and the like which occurred after the normal school day. (A. 86)

On cross-examination it was shown that Mrs. Wright was a "patron" of the private school and engaged in various activities, such as raising money, for the institution after fulfillment of her duties at the public school. (A. 90-91) Although she testified that she believes in the public school system and would, indeed, send her children back if they were taught religion, (A. 88) the witness did indicate that she was not "totally committed to a desegregation [*sic*] school system." (A. 95) Mrs. Wright is currently unemployed. (A. 13, 90)

(3) Mrs. Loula Adams has 4½ years teaching experience. (A. 14) She has a 6 year-old son with an enunciation defect who was enrolled at the Academy pursuant to the advice of a speech pathologist at the University of Tennessee. (A. 41, 44, 242) The basis for the decision was a calmer environment, individual attention, and religious training .(A. 41-42, 49) On cross-examination, it was again admitted that the Academy, unlike the Attendance Center, had no speech therapist. (A. 47-50) Mrs. Adams explained, however, that the calmer environment counterbalanced the absence of the therapist. (A. 49) Mrs. Adams is currently employed as a part-time secretary at a salary of $74 per week. (A. 14, 53)

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[14] The academy has a small program of morning devotionals and story hours involving biblical accounts. (A. 56)

SUMMARY OF ARGUMENT

The policy adopted by the Calhoun County School Board, as written and applied, is a prophylactic measure denying all teachers in the county their fundamental right, *Runyon* v. *McCrary,* 44 U.S.L.W. 5034 (U.S. June 25, 1976), to send their children to any *private* school—segregated or not. It is therefore subject to being struck as overbroad.

Pickering v. *Board of Education,* 391 U.S. 563, and its progeny teach that prior to the curtailment of a First Amendment right, there must be a record demonstrating *facts* which give rise to a reasonable conclusion that the imposition of a prior restraint is necessary to protect the public school function from serious impairment. With respect to the instant record, however, there is no evidence that: (1) the practice of teachers generally in sending their children to private schools had any effect on the Calhoun County public school system—as contrasted with school authorities; or (2) the decision of petitioners specifically to send their children to Calhoun Academy had any effect whatsoever on their teaching ability. In this context the policy is an unconstitutional infringement on petitioners' First Amendment exercise.

Finally, this past term in *Elrod* v. *Burns,* 44 U.S. L.W. 5091 (U.S. June 28, 1976), this Court reaffirmed a long line of cases consistently disapproving governmental action denying rights and privileges solely because of a citizen's association with an unpopular organization. Direct associational activities by teachers spanning the distance from the Communist Party to the KKK and the NAACP are now presumptively free from state abridgement through termination of

employment. This being so, no constitutional justification exists for blanket terminations of teachers on the singular basis that they choose to exercise their fundamental associational right to send their children to a private, segregated school.

ARGUMENT

I

The Right in Issue

In *Runyon* v. *McCrary,* 44 U.S.L.W. 5034 (U.S. June 25, 1976), this Court reviewed its decisions relating to freedom of association, *e.g., NAACP* v. *Alabama,* 357 U.S. 449, parental rights, *e.g., Pierce* v. *Society of Sisters,* 268 U.S. 510, and the right of privacy, *e.g., Roe* v. *Wade,* 410 U.S. 113, and reaffirmed, in no uncertain terms, a parent's basic, fundamental right to send his or her child to any school of his own choosing without interference from the state. With an analysis directly applicable to the instant case, the opinion makes clear that the fundamentalness of the right is not diminished by the form the exercise takes.

> [P]arents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and . . . the children have an equal right to attend such institutions. [44 U.S.L.W. at 5039] [15]

Petitioners do not claim an absolute right to continued employment in the Calhoun County public

[15] This right is subject to the acknowledged "power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils. . . ." 44 U.S.L.W. at 5040. The Calhoun County School Board does not, of course, have any power over the private academy nor may it "preempt the educational process by requiring children to attend public schools." *Id.* at 5039.

schools. On the basis of clear precedent, however, they do contend that they may not be deprived of their positions for constitutionally impermissible reasons. Specifically, petitioners, and all other teachers in Calhoun County, enjoy the fundamental right reaffirmed in *Runyon* which exists independently of their contractual or tenure status or of some notion of their "subjective expectance" for reemployment. The circumstances justifying curtailment of this right lie at the heart of this case.

II

The Policy, as Written and Applied, Is Overbroad

District Judge Keady limited the policy to teachers sending their children to the private, segregated academy, expressing "no opinion as to whether the policy might validly extend to teachers sending their children to schools which do not foster racial discrimination . . . ." 365 F. Supp. at 859. The *per curiam* factual opinion of the Fifth Circuit perceived a "pragmatic virtue [in] facing up to the real issue," 511 F.2d at 746, and agreed with the limited construction. This approach to the facts, however, reflects an acceptance of the enticing invitation this case offers as an appropriate vehicle for a constitutional decision stemming from a presumed unique, compelling fact situation.

This Court obviously has the opportunity to accept a limiting construction if it believes that the record fairly supports the conclusion that a school board in a rural county in Mississippi has—after due deliberation [16]—instituted this policy because of a sincere, seri-

[16] In light of the fact that consideration of the policy began in a time frame close to issuance of the desegregation order of 1968, it must also be assumed that the board perceived District Judge

ous, overriding belief that it had not taken sufficient steps (after court-ordered desegregation) to implement a unitary system. Although possibly possessing certain "pragmatic virtues," this construction of the record creates a factual setting by judicial fiat, totally unrelated to what actually occurred in Calhoun County. Specifically, such an approach wholly fails to accept a carefully devloped record clearly demonstrating that the policy, as written and applied, prohibited *all* public school teachers from sending their children to *any* private school for *any* reason.

Testimony of Roger Hudson, principal of petitioners' school, John Burt, superintendent, and R. W. Mallory, school board president, as well as the school board's attorney (via letter to the Justice Department) clearly substantiate this conclusion. The threatened loss of position of the black teachers with a child attending school in Atlanta and the situation of Mr. Hamblin with children attending the Magnolia School for the Deaf are striking examples of the policy as written and applied. Finally, attorneys for respondent, in addition to stipulating the case on the issue of the constitutionality of the policy as literally worded, produced expert testimony detailing the "reasonableness" of the board's action as applied to all teachers and all private schools. Indeed, no significant portion of their testimony related to presenting empirical validation of the adverse consequences to black students as a result of a white teacher's decision to send his or her children to a private, segregated school —much less Calhoun Academy.

Keady's mandate in that case as not sufficiently broad to bring about a true unitary system.

Paralleling this solid foundation of evidence on the blanket application of the policy is the fact that *all* major witnesses for respondent, including the educational psychologists, stressed the "right" of school authorities to utilize the ultimate coercive sanction of termination (or, if you will, failure to rehire) in order to insure "dedication" to the public school system, as administered by the principal, superintendent and the board.

Judge Coleman's analysis of the facts and the resulting issue is therefore clearly correct:

> [*The policy*] *applied to all teachers who had educable children and some of them complied with it.*
>
> . . . .
>
> The case then boils down to this:
>
> Under the facts of this case, does the United States Constitution deny a public school board the authority to adopt and *uniformly enforce a policy clearly designed, in good faith, to insure the undivided dedication of its teachers (and the appearance of that dedication) to the public school function?* . . .
>
> Actually, those of the general public, who pay the taxes, who keep the public school doors open, and who depend on those schools to educate their children, have a right to expect *undivided teacher dedication, free of any real or apparent conflicts of interest.* [511 F.2d at 749 (Emphasis added.)]

This analysis focuses on the realities facing public school teachers in Calhoun County. As postulated, the parallels between petitioners and the children coerced to salute the flag in *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, are clear both in fact and in law.

> If [,however,] there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. [*Id.* at 642]

Any fair reading of the record reveals that the mere presence of a private school in the county, coupled with a small minority of teachers sending their children there and elsewhere, was sufficient to generate a direct, vindictive [17] and authoritarian response on the part of the school officials, terminating a fundamental right of teachers once and for all. The most obvious conclusion: a decision reflecting the proprietary instinct [18] of all officials within the system. Stemming either from fear of a perceived growing competition for students by private schools or from their own [19] subjective im-

[17] In addition to the previously noted comments by school authorities about "not needing" a private school in the county, Mr. Mallory, the board president, was asked on cross-examination whether the "private school has ever done anything to your public schools to hurt them in any way?" (A. 238) His response is indicative of an emotional, defensive climate:

> Well, public opinion, you know, some people have a lot of influence, some people influence other people in their thinking. *And just talking something over the counter can have a whole lot of effect on the way the general public looks at schools.*

(A. 238) (Emphasis added.)

[18] This was apparently highly sensitized as demonstrated by the extensive concern expressed by the board president over newspaper accounts detailing fund raising activities on behalf of Calhoun Academy. (A. 218-22, 329-35)

[19] It cannot be assumed that this school board's action mirrored community values and interests as their power has been historically exercised. What has happened in Calhoun County, however, fits the role-model of the American public school teacher. History documents the fact that American teachers in our society have been

pressions as to what individual teachers were signaling [20] when they did not send their children to the public schools, all persons vested with power over the careers of teachers joined in an unequivocal mandate: Subject to the penalty of termination, no teacher will, through the act of sending his or her child to any private school, demonstrate to us *any dissatisfaction* with the way we have chosen the public school system to operate (curriculum, teacher selection, etc.)[21]

As is more fully demonstrated in the following sections, it is obvious that implementation of this blanket prohibition extends the board's power far beyond that which can be characterized as legitimate. *Pickering* v. *Board of Education,* 391 U.S. 563 (dismissal on the sole basis of a First Amendment exercise characterized as "disloyal" is impermissible); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (states may not preempt the educational process by requiring children to attend public schools). If a parent-teacher

subjected to almost total dominance in almost every aspect of their lives by school authorities. BEALE, A HISTORY OF TEACHING IN AMERICAN SCHOOLS (1941). For a detailed contemporary commentary reaching similar conclusions see Sullivan, *The Rights & Status of the Teachers as a Citizen,* Dissertation, 1971, on file Miami University Library, Oxford, Ohio.

[20] As stated by the board president:

> But these—the people that—we'll say [among others] the people that are sending their kids to this Calhoun Academy were pretty well of one mind on the thing. You know what I mean. They thought, "We just as well forget the public school system."

(A. 230)

[21] *Cf.* McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968) (failure to rehire teachers joining the American Federation of Teachers held violative of their associational rights).

wishes to send a retarded or otherwise handicapped child to a private, nondiscriminatory institution for special treatment, no useful purpose related to substantial educational goals would be served by requiring the child to be enrolled in the public school system. It is also probable that a parent-teacher might wish to enroll a child in a desegregated private school, military academy, or parochial school for religious training, or, for that matter, merely acquiesce to his or her child's own independent choice to attend these and other types of institutions. Again, it is *impossible* to perceive any legitimate, compelling state interest which would be sufficient to curtail the exercise of this right by teachers employed by the Calhoun County system. In these and analogous cases, no adverse effects which might justify a prohibition on this activity may reasonably be anticipated. Since all these possibilities are foreclosed by the challenged policy, it is obviously overbroad.

In *Young* v. *American Mini Theatres, Inc.*, 44 U.S.L.W. 4999 (U.S. June 24, 1976), this Court reviewed its past receptiveness to challenges of facial overbreadth:

> "Such claims . . . have been entertained in cases involving statutes which, by their terms, seek to regulate "only spoken words." . . . In such cases, it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes. Overbreadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes

> which, by their broad sweep, might result in burdening innocent association. [*Id.* at 5002 n.17]

Continuing, the opinion set forth the factors necessary to substantiate an overbreadth attack. First, the deterrent effect must be both "real and substantial," and second, the statute or ordinance in question must not be "readily subject to a narrowing construction by the state courts . . . ." *Id.* at 5002.

The Calhoun County School Board's policy meets both criteria. There can be little doubt that there exists a real, substantial, chilling effect on *all* teachers within the system desiring, for innumerable legitimate reasons, not to utilize the public school system for the education of their children. Moreover, the possibility of a limiting construction is, at best, remote. First, it was applied as written. Second, respondents explicitly joined in a test of facial validity by stipulation. Third, the policy, by its plain terms, is not readily susceptible to a narrowing construction. Fourth, all witnesses on behalf of respondent testified as to its blanket applicability. Identifying similar factors in *Erzoznick* v. *City of Jacksonville*, 422 U.S. 205, this Court concluded:

> In these circumstances, particularly where as here [respondent] . . . *offers several distinct justifications for the ordinance in its broadest terms*, there is no reason to assume that the ordinance can or will be decisively narrowed. [*Id.* at 217 (Emphasis added.)]

On the basis of the foregoing, the policy must be struck as overbroad.

III

Under This Court's Decision in *Pickering*, Petitioners' Loss of Employment Is Unconstitutional

Current methodology reconciling individual and state interests is reflected in the analysis adopted by this Court in *Pickering* v. *Board of Education,* 391 U.S. 563.[22] An Illinois teacher was dismissed for writing a letter to a local newspaper critical of his school board. The board defended the dismissal by asserting, as respondents do here, that teachers within the system have a "duty of loyalty," *id.* at 568, and that the letter—as is allegedly the activity in the instant case—was "detrimental to the efficient operation of the schools in the district . . . ." *Id.* at 564. This Court reversed the lower court's holding (which was similar to the conclusion reached by two judges in the instant case) that Pickering's acceptance of a teaching position in the public schools obliged him to refrain from engaging in First Amendment activity related to the operation of the schools "which in the absence of such position he would have an undoubted right to engage in." *Id.* at 567. In so doing, this Court recognized that while the interests in public employment have been dichotomized into those of the individual and those of the government, neither interest would rule out the

[22] Individual interests subject to the *Pickering* analysis must involve exercises of fundamental rights as contrasted with those falling outside explicit protections found within the Constitution. In the latter circumstance, all state regulation will withstand constitutional challenges unless branded "arbitrary." *See* Kelley v. Johnson, 96 S. Ct. 1440 (upholding hair regulations for policemen); *cf.* Wardell v. Board of Educ., 529 F.2d 625 (6th Cir. 1976) (residency requirements for teachers; no fundamental right to commute); *accord,* McCarthy v. Philadelphia Civil Serv. Comm'n, 96 S. Ct. 1154, *citing Wardell* with approval.

other. A proper resolution of their conflict demanded they be balanced against each other.

> "[T]he theory that public employment which may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." . . . At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher as a citizen . . . and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. [*Id.* at 568]

As posited, application of a balancing approach incorporated as a dispositive factor the degree to which professional effectiveness was lowered by the First Amendment activity in question.[23] The Court in *Pickering* found the record devoid of *any* evidence pertaining to the effect of the letter on the

[23] This is to be distinguished from the status of the individual raising the claim. As stated by Mr. Justice Marshall, "the status of the individual raising the claim bears [not on the existence of the right but rather] on the question of whether the right is outweighed by a legitimate state interest." Kelley v. Johnson, 96 S. Ct. 1440, 1449 n.5 (Marshall, J., dissenting). Were it any other way that "would mean that more than 11 million American citizens are currently affected by having 'executed' . . . 'automatic waivers.' " *Id.*

In *Pickering* this Court held that if a teacher's exercise of his constitutional freedoms destroyed his harmonious relations with co workers, impaired the ability of his superiors to maintain proper discipline, impeded the administration of the school by publicly airing private disputes rather than public issues, or impaired his own ability to remain an effective teacher, then the school board could have a permissible basis for terminating his employment. 391 U.S. at 569-73.

community as a whole or the school system in particular. Indeed, if anything, it demonstrated that Pickering's First Amendment exercise "was greeted by everyone but its main target, the Board, with massive apathy and total disbelief." *Id.* at 570. Since the exercise had *no* adverse impact on legitimate state interests, the dismissal was not constitutionally sustainable.

Later cases make clear that once an infringement of a First Amendment exercise occurs within the school environment, authorities curtailing the exercise must justify their action by showing "material and substantial" interference with a legitimate school function. *Tinker* v. *Des Moines Independent School District,* 393 U.S. 503, held unconstitutional a limitation on student First Amendment behavior protesting the Vietnam War. Prefacing the analysis with the statement that "[i]t can hardly be argued that either students or teachers shed their constitutional rights . . . at the schoolhouse gate," *id.* at 506, the opinion concluded in the style of *Pickering:*

> As we have discussed, the record does not demonstrate any *facts* which might reasonably have led school authorities *to forecast substantial disruption of or material interference with school activities,* and no disturbances or disorders on the school premises in fact occurred. [*Id.* at 514 (Emphasis added.)]

In *Healy* v. *James,* 408 U.S. 169 (unconstitutional exclusion from campus of SDS Chapter), this Court again rejected curtailment of First Amendment activities on the basis of "undifferentiated fear" (abhorrence to the philosophies of a group), and concluded that in all First Amendment cases taking

the form of prior restraint, a "heavy burden" of proof[24] is placed on school administrators to justify infringement. *Id.* at 184. Mr. Justice Powell continued in language pertinent to the facts of the instant case:

> [T]he Court has consistently disapproved governmental action . . . denying rights and privileges solely because of a citizen's association with an unpopular organization. . . . [I]t has been established that "guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government," is an impermissible basis upon which to deny First Amendment rights . . . . The Government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims. [*Id.* at 185-86]

Continuing, the Court found that "[t]he mere disagreement of the President [as herein the Calhoun County School authorities] with the group's philosophy affords no reason [without more], to deny . . . [associational freedoms]." *Id.* at 187. Finding no factual support in the record from which it could be concluded that organizational members would disobey "campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education," *id.* at 189, the basic right of associational freedom without school infringement was affirmed.

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[24] The extent of the burden is clearly evinced in a separate line of cases. In Stanley v. Illinois, 405 U.S. 645, this Court admonished against basing determinations on presumptive evidence when important interests are at stake. Similarly, a presumption that a teacher was incapable of continuing her duties beyond the fifth month of pregnancy was declared unconstitutional as violative of Due Process in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632.

Pickering and its progeny control the instant case. The record is devoid of the evidence needed to constitutionally sustain either the individual terminations of employment or, as a secondary matter, the "heavy burden" of proof placed on school authorities to—in a classic form of prior restraint—impose a blanket preclusion of associational freedoms, on all teachers and their children within the system.

(1) *Petitioners:* As stipulated, the sole basis for termination of petitioners' employment was violation of the policy. It was therefore not related to any subjective or objective reasons petitioners possessed either at the time their choice was made or from any resulting "carryover" effect into the school environment. Indeed, after an extensive inquiry into their motivations, District Judge Keady failed to make *any* finding with respect to objective tainted "racist" activity (presumably the only "unlawful" activity at issue) or any adverse consequences to the school environment because of their individual actions.[25] In the

[25] Judge Keady found that "the dominant . . . reason why each [petitioner] enrolled his or her children in Calhoun Academy was to avoid the desegregated public school system." 365 F. Supp. at 858. Obviously, this reasoning applies to all parent-teachers sending their children to any private school. It also fails to take into consideration those reasons totally disassociated from a racial animus for sending one's child to a segregated facility.

The case would stand on a much different constitutional footing if the record affirmatively demonstrated racial attitudes on the part of the petitioners which, for example, through proselytizing, carried over into the classroom with an adverse learning impact. *Cf.* Smith v. St. Tammany Parish School Bd., 448 F.2d 414 (5th Cir. 1971) (injunction against display of Confederate flag in principal's office; resulting disruption through demonstrations); Banks v. Muncie Community Schools, 433 F.2d 292 (7th Cir. 1970) (utilization of Confederate symbols causing disruption enjoined).

classic *Pickering* mold, petitioners' action was greeted by everyone but the school authorities with not only "massive apathy," but also, on the basis of the record made below, with "massive ignorance."

(2) *All Teachers:* Aside from the specifics of petitioners' case, the record is seriously deficient of evidence, other than the concerns expressed by school authorities, indicating that those circumstances giving rise to the policy were such as to mandate action by the board. Particularly, other than passing reference to "you would hear talk" and hearsay testimony over concerns expressed by the "Simpson kids," no direct, factual and credible evidence demonstrates that passage of the policy was necessary to protect the educational environment of the Calhoun County School System.[26] *Cf. Tinker* v. *Des Moines Independent School District,* 393 U.S. 503, 509 (prohibitions on future First Amendment activities must be justified "by something more than a mere desire to avoid dis-

[26] This, of course, distinguishes the instant case from United Public Workers v. Mitchell, 330 U.S. 75, and United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, upholding the Hatch Act. In the latter decision, the Act was sustained not because the government has any plenary power to restrict personal freedoms of its employees, but because the government clearly identified interests served by the Act which the Court, in turn, found overbalanced those of federal employees. 413 U.S. at 564-67. As this Court also subsequently noted in Elrod v. Burns, 44 U.S.L.W. 5091 (U.S. June 28, 1976), "legislative restraints on political management and campaigning were [upheld in *Letter Carriers* and *Mitchell*] . . . because they served to *protect* individual belief and association and, thereby, the political process." *Id.* at 5097 n.20 (Emphasis added.). Put another way, the deliberate judgment of Congress, based on historical evidence, was upheld in order "to safeguard the core interests of individual belief and association." *Id.* at 5098.

comfort and unpleasantness . . .").[27] Thus, in the instant case, as in *Pickering:*

> [T]he only way in which the Board could conclude, *absent any evidence of the actual effect of the letter* [as here, the sending of children to private school] . . . was per se detrimental to the interest of the schools was to equate the Board members' own interests with that of the schools. [391 U.S. at 571 (Emphasis added.)]

Singular justification for the policy must therefore come from the after-the-fact generalized testimony on the part of two educational psychologists. As previously demonstrated, a major portion of their presentation related to the policy's reasonableness in the context of teacher commitment; an insignificant, conclusory segment was directed to its utilitarian value vis-à-vis the unitary school concept.

With respect to the first justification, *Pickering* teaches that lengthy postulations concerning the "rea-

[27] Mr. Justice Fortas, finding no factual support in the record concerning adverse consequences stemming from the prior exercise of the First Amendment activity at issue (wearing armbands), concluded:

> Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.

393 U.S. at 509. As in the instant case, there was also support in the record to justify the conclusion that it was not fear of disruption to the education process that motivated the board's action, but, it, rather, "was directed against 'the principle of the demonstration' itself." *Id.* at 509 n.3. *See also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 641 n.9 (belief of board that pregnancy regulation should be passed because some children think "teacher may have swallowed a watermelon").

sonableness" of curtailing the fundamental rights of all teachers in the system in order to insure "dedication" and avoid "conflicts of interest" is not a sufficient substantial state interest, in and of itself, to curtail the exercise of a fundamental right.[28] Thus, a teacher may engage in *any* type of First Amendment activity capable of being characterized as "disloyal" or a demonstrated "lack of dedication" *up to the point* it affects his professional competence within the school environment. 391 U.S. at 573 n.5; *accord, Elrod* v. *Burns,* 44 U.S.L.W. 5091 (U.S. June 28, 1976). While the record made by respondents' experts is replete with such terms as "potential," "may," "could," "if," and "probably," most poignant is this portion of Dr. Harlan's testimony when juxtaposed with applicable constitutional standards of material and substantial interference with the teaching function:

> Well, if the student is perceiving the teacher as negative and that it is not a viable place for your own children to go then that would have an effect on the student's achievement, he would not perceive it in a positive way and, therefore, *probably* would not achieve as well.
>
> Q Would this be a positive effect or detrimental effect?
>
> A Well, I would say that it would be detrimental. *I wouldn't use "detrimental," I would*

[28] *See* Pickering v. Board of Educ., 391 U.S. 563, 574 n.6 (noting that the opinion does not attempt to deal with the issue of First Amendment activities which may "reasonably be presumed" to have harmful effects on the school environment); *cf.* Keckeisen v. Independent School Dist., 509 F.2d 1062 (8th Cir. 1975), *cert. denied,* 96 S. Ct. 57 (dismissal for violation of regulation prohibiting marriages between administrators and teachers).

> *probably use something like negative or just a lack of positive reinforcement.* [A. 124 (Emphasis added.)]

This testimony, as did that in *Pickering,* speaks to nothing more than factually unsubstantiated "reasonable conclusions" that the First Amendment exercise in issue *may be* "detrimental to the best interests of the schools." 391 U.S. at 567. Neither it nor anything else in the record produces the quality of evidence needed to meet the constitutional standard.[29]

With respect to the policy as a means of properly implementing a unitary school system the posed justification is feeble. It completely fails to demonstrate a credible link between the act of placing a child in Calhoun Academy and actual adverse educational consequences to the unitary system. To justify a constitutional termination of the employment of all teachers sending their children to a private, segregated academy, the fact that teachers sent their children to such a school must be used to infer an attitude of racial

[29] In the context of a First Amendment exercise, there are no decisions by this Court holding that expert testimony of the quality found in the instant record may be utilized to curtail the constitutional exercise. *Cf.* Paris Adult Theatre I v. Slayton, 413 U.S. 49. As recently noted by the California Supreme Court:

> [T]estimony which qualifies as admissible expert or opinion testimony . . . is, of course, perfectly good evidence. However, *where such testimony is not based upon actual experience,* it has limited utility in justifying a restriction of freedom of expression.

Los Angeles Teachers Union v. Los Angeles Bd. of Educ., 71 Cal. 2d 551, 44 P.2d 827, 835 n.13, 78 Cal. Reptr. 723 (1969) (Emphasis added.). This court now accepts such testimony to show the reasonableness of a regulation, but not as proof that the public gain to be derived from limiting constitutional exercises outweighs resultant impairments of freedom of expression. *Id.*

prejudice, from which classroom discrimination is inferred, from which negative social reinforcement and concomitantly inferior learning are, in turn, inferred.[30]

There is no *justification* for the deprivation of a fundamental right based on such a tenuous linkage of inferences. This Court, through *Pickering, Tinker,* and *Healy,* has mandated that inferences must be drawn from concrete facts, not abstractions; *and the concrete fact in this case* is that other than adverse reactions by school officials the record is *devoid* of evidence concerning a debilitating effect on the black children in the public school system *directly* related to white teachers sending their children to the private academy. The secondary *fact,* of course, is that three capable, individualistic, and experienced teachers—stipulated by respondents to be fully qualified—have been dismissed for one reason and one reason only: violation of a policy clearly infringing on all teachers' fundamental First Amendment rights *with no record* showing through credible, factual evidence that the exercise of this right by teachers in general or the petitioners in particular *in any way* affected the public school

[30] There is no significant correlation between perceived teacher attitudes toward integration and the academic achievement of southern Blacks. UNITED STATES DEPT. OF HEALTH, EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY OFFICE OF EDUC., 2 COLEMAN REPORT (1966) (Supplemental index). A more recent study concludes: "There is no evidence that school reform can substantially reduce the extent of cognitive inequality, as measured by . . . test scores or educational attainment." C. JENCKS, INEQUALITY 8 (1972). *Compare* Davidson & Land, *Children's Perception of Their Teachers' Feelings Toward Them Related to Self-Perception, School, Achievement & Behavior,* 29 J. EXPERIMENTAL EDUC. 107, 112 (1960), *with* S. Koslin, B. Koslin & R. Paragament, *Efficacy of School Integration Policies in Reducing Racial Polarization,* Paper presented at the American Psychological Association, Honolulu, Hawaii, Sept. 1972, at 14.

system. On the basis of *Pickering* the decision below must be reversed.

IV

The Policy Is a Per Se Violation of First Amendment Rights

Although this Court's decisions relating to overbreadth and *Pickering* are sufficient to justify a reversal in the instant case, there exists a separate, distinct line of cases bearing upon the constitutionality of Calhoun County's prophylactic curtailment of First Amendment freedoms within the school system. The criteria these decisions develop are specific, thoroughly considered, and now enjoy the status of an integral part of the day-to-day working relationships between all public employees and the government.

Adler v. *Board of Education,* 342 U.S. 485, played a major role at the trial and appellate stages of this case. After noting that teachers work in a "sensitive" classroom environment, the basic holding of *Adler* was that the "privilege" of working for a school system may be denied on the basis of "tainted" organizational activities—there, membership in a subversive organization. Although Judges Keady and Coleman found the decision persuasive in the context of bearing on the "reasonableness" of the Calhoun County policy, *Adler* is a constitutional derelict.

In *Keyishian* v. *Board of Regents,* 385 U.S. 589, this Court held the Feinberg Law (also at issue in *Adler*) unconstitutional on the basis of vagueness and overbreadth. Mr. Justice Brennan, after stating the flat constitutional prohibition against stifling fundamental personal liberties "even though the governmental purpose be legitimate and substantial," *id.* at 602, turned his attention to the *Adler* philosophy:

> [T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable has been uniformly rejected . . .. It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. [*Id.* at 605-06]

The demise of *Adler* was thus complete.[21] More recently, in *Perry* v. *Sindermann,* 408 U.S. 593, a teacher alleged that his 1-year contract was not renewed because of a First Amendment exercise. Responding to the argument that a lack of contractual or tenure rights defeated a claim of constitutional significance, the Court, per Mr. Justice Stewart, stated that the government

> may not deny a benefit to a person on a basis that infringes his constitutionally protected interest—especially, his interest in freedom of speech. *For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would be penalized and inhibited. This would allow the government to "produce a result [it] could not command directly."* [*Id.* at 597 (Emphasis added.)]

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[21] *See also* Pickering v. Board of Educ., 391 U.S. 563, 568:

> To the extent that [the lower court opinion] may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.

This past Term, in *Elrod* v. *Burns*, 44 U.S.L.W. 5091 (U.S. June 28, 1976), associational activities by public employees and the circumstances under which the state might curtail this right were definitively analyzed in the context of this Court holding unconstitutional the practice of political patronage dismissals of nonpolicy-making state employees. Mr. Justice Brennan, speaking for the Court, initially focused on the constitutional fact that political beliefs and associations "constitute the core of those activities protected by the First Amendment . . . ." *Id.* at 5094. Citing *Keyishian* and *Sindermann*, the Court stated:

> Patronage practice falls squarely within the prohibitions [of these cases] . . . . *Under that practice, public employees hold their jobs on the condition that they provide, in some acceptable manner, support for the favored political party.* The threat of . . . dismissal for failure to provide support only penalizes its exercise. The belief and association which Government may not ordain directly are achieved by indirection. [*Id.* at 5095 (Emphasis added.)]

Answering the ever present "right-privilege" argument,[22] Mr. Justice Brennan stated:

> That is the notion that because there is no right to a Government benefit, such as public employment, the benefit may be denied for any reason. *Perry*, however, emphasized that "[f]or at least a quarter-century this Court has made clear that even though a person has no 'right' to a valuable

[22] Reference to *Adler* was only made in the context of its place in a line of cases inferring "ill conduct grounded merely on political associations." The fact *was again* noted that, since that decision, *Adler's* basic philosophy has been "consistently rejected." 44 U.S.L.W. at 5097 n.19, *citing Keyishian*.

> governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." . . . *Perry* and *Keyishian* properly recognize one such impermissible reason: the denial of a public benefit may not be used by the Government for the purpose of creating an incentive enabling it to achieve what it may not command directly. "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." . . . "[T]his court has now rejected the concept that constitutional rights turn upon whether the governmental benefit is characterized as a "right" or as a "privilege." '" [*Id.* at 5095]

With respect to the degree of scrutiny employed by this Court when associational activities are impaired by governmental action, Mr. Justice Brennan detailed existing principles relating to the constitutionally mandated *exacting* nexus required between a proven high state interest and the right curtailed: (1) "a significant impairment of First Amendment rights must survive exacting scrutiny;" (2) "[t]he interest advanced must be paramount, one of vital importance, and the burden is on the Government to show the existence of such an interest;" (3) "it is not enough that the means chosen in furtherance of the interest be rationally related to that end;" (4) "[t]he gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights;" (5) means must be employed which are "closely drawn to avoid unnecessary abridgement;" (6) "[p]recision of regulation must be the touchstone in an area so closely touching most precious freedoms;" and (7)

> In short, if conditioning the retention of public employment on the employee's [loss of associational freedoms] . . . is to survive constitutional challenge *it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end,* and the benefit to be gained must outweigh the loss of constitutionally protected rights. [*Id.* at 5096 (Emphasis added.)]

Turning to the argument that one justification for patronage was "the need to insure effective government and the efficiency of public employees," *id.* at 5096, this Court initially noted the gross inefficiency of wholesale replacements and the questionable conclusion that replacements would be "more qualified." Continuing:

> *More fundamentally, however, the argument does not succeed because it is doubtful that the mere difference of political persuasion motivates poor performance; nor do we think it legitimately may be used . . . for imputing such behavior.* The Court has consistently recognized that mere political association is an inadequate basis for imputing disposition to ill-willed conduct. [citing *Keyishian*] . . . At all events, less drastic means for insuring government effectiveness and employee efficiency are available to the State. *Specifically, employees may always be discharged for good cause, such as insubordination or poor job performance, when those bases in fact exist.* [*Id.* at 5096-97 (Emphasis added.)]

Similar postulated interests of the state met identical rejections, *i.e.*, the "need for political loyalty" was rejected by limiting dismissals to policymaking positions, an obviously "less drastic" alternative and "preservation of the democratic process" was found inadequate since associational freedoms are essential to a meaningful democratic system. *Id.* at 5097-98.

The Court's analysis in *Elrod* is directly applicable to the instant case. The Calhoun County School Board policy obviously results in a severe curtailment of First Amendment freedoms, *i.e.*, teachers within Calhoun County "hold their jobs on the condition that they provide, in some acceptable manner, support" for the public school system. "The threat of dismissal for failure to provide support only penalizes that exercise." In contrast to the constitutional demand for "precision of regulation" and the prohibition against limiting associational freedoms when the state interest may be only rationally related to the end achieved, the policy as written is blanket in nature. Specifically, it cuts an arbitrary, draconian swathe, curtailing First Amendment exercises on the part of all teachers, no matter how tenuous the state interest is or may be.

If limited to teachers with children in the private segregated academy, it transgresses *Keyishian* and *Elrod* by impermissibly imputing poor or adverse performance characteristics to assumed, unproven beliefs stemming from the exercise of a fundamental associational right. This right, however, is, and will continue to be, exercised for any number of reasons disassociated from the tainted racial overtones assumed by the board, *i.e.*, the teacher in the public school, while completely satisfied with his or her performance, may have serious qualms concerning all or a remainder of the other portions of the curriculum and choose to send a child elsewhere, even at the expense of an integrated education. The "highly imprecise" characteristics

of the policy have been previously analyzed by Judge Clark:

> The fit between the Board's policy and the governmental interest it is alleged to serve is highly imperfect: it excludes from the public schools teachers who do not possess the characteristics that underlie its premises but who are unwilling to abide by its terms, while it permits to remain teachers who possess racial attitudes of much greater disadvantage to their students. Whatever actual benefits may accrue to the school system by operation of the policy will be as much by coincidence as by design. The reason for this is plain. The Board has incorrectly singled out a teacher's decision to send his or her own children to private school as an infallible indicator of an undesirable classroom effect that it has a legitimate interest in removing. Because of this, the policy acts arbitrarily to deny a fundamental right to public school teachers and therefore cannot be upheld. [511 F.2d at 753]

Obviously there exists a "less drastic means" similar to that found in *Elrod*. If the exercise of the associational right does result in poor job performance (as found through annual evaluations and other techniques) discharge may constitutionally be imposed.

It is also doubtful that the gain to the subordinating interest provided by the means will outweigh the incurred loss of protected rights. The facts of this case demonstrate that the Calhoun County School System lost the services of three qualified, competent professionals on the basis of a record which includes *no evidence* that their constitutionally-protected exercise had any adverse effect on their performance in the classroom or within the school system generally. There is,

however, a significant percentage of the population falling outside that portion inhabited by petitioners, *e.g.*, single persons; married persons without children; married persons with children enrolled in the public school system, who, for any number of reasons, are less qualified, albeit employable, and who may also possess racial attitudes inappropriate to the school environment. Absent adequate screening mechanisms capable of exploring the subjective, emotional biases of prospective teachers, it is clear that selection from the replacement population will hardly reflect a significant gain outweighing the incurred loss of associational rights of teachers in Calhoun County.

The foregoing analysis postulates what petitioners contend is the correct constitutional framework for the instant case. What it fails to do, however, is to highlight the evolution of applicable constitutional standards in the context of past broad infringements of associational freedoms by state and local governments when faced with real or perceived threats to existing state interests. The history of the Court's increasing concern with the undue burdening of extramural innocent associational activities by firings, imposition of loyalty oaths and the like, from *Adler* to *Keyishian*, is fresh and well documented. *See, e.g.*, Developments in the Law, *Academic Freedom*, 81 HARV. L. REV. 1045 (1968). One decision in this line, however, bears special mention in light of the contrast in its facts with the instant case.

The case arose from the Eastern District of Arkansas under the caption of *Shelton* v. *McKinley*, 174 F. Supp. 351 (E.D. Ark. 1959). Injunctive and declaratory relief were sought against two acts passed by the Arkansas Legislature. The first (Act 10) provided

that no teacher could be employed within the state until an affidavit was submitted listing all organizational affiliations within the preceeding five years. The second (Act 115) incorporated a lengthy preamble, the gist of which was a legislative finding that the NAACP had been guilty of creating "racial strife and turmoil." *Id.* at 354. (as respondents attempt to so characterize those supporting the Calhoun Academy enclave)[33] This, in turn was followed by Section 1 making it unlawful for any member of the NAACP (now teachers with children in private school) to be employed by any school within the state.[34]

Citing *Adler,* the disclosure requirements of Act 10 were upheld as reasonably related to a determination of professional fitness. With respect to Act 115, however, the court, citing *Wieman* v. *Updegraf,*[35] concluded:

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[33] See A. 404-17, for a compilation of newspaper articles introduced by respondents detailing occurrences at the local Citizens Council meetings.

[34] Section 2 of the Act made a refusal to furnish an affidavit that a person was not a member of the NAACP a ground for dismissal from employment. Section 3 provided a hearing for all persons discharged from public employment on account of NAACP membership. 174 F. Supp. at 354. While the record in the instant case reflects no receptiveness by the Calhoun County Board to have granted petitioners a hearing, (A. 243-45) the analysis found in *Shelton* is directly applicable:

> That section [3] gives one who was dismissed or denied employment on the ground that he was a member of the NAACP, and who claims that he was not a member, an opportunity to obtain a hearing on that issue alone. Once membership is *established, [however,] then discharge or a declaration of ineligibility automatically follows.*

174 F. Supp. at 358 (Emphasis added.).

[35] 344 U.S. 183 (holding that public employees could not be terminated for patently arbitrary and discriminatory reasons).

> [T]he statute is clearly unconstitutional since it makes mere membership in the NAACP a ground for dismissal from or a declaration of ineligibility for public employment, regardless of whether the employee or applicant involved had any knowledge of or sympathy with the aims and purposes of the organization, as declared by the Legislature, or had actively participated in the activities found by the Legislature to be anti-social and undesirable, or whether he was completely innocent of such knowledge, sympathy or participation and *had joined and was desirous of maintaining his membership in the Association out of sympathy with its publicly announced objectives which* are clearly lawful. [*Id.* at 358 (Emphasis added.)]

So clearly correct was this holding that no appeal was taken by the state.[36] Appeal was taken, however, by

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[36] From an historical and constitutional perspective, it should also be noted that the court in *Shelton* placed heavy reliance on Chief Judge John Parker's dissent in Bryan v. Austin, 148 F. Supp. 563 (E.D.S.C. 1957). South Carolina had also enacted a statute prohibiting members of the NAACP from teaching. With now Mr. Justice Marshall bringing the suit, the three-judge panel abstained and this Court vacated and remanded as moot. 354 U.S. 933. Judge Parker's opinion bears quoting in the context of juxtaposing the Calhoun County policy:

> There is no finding in the preamble to the statute, nor is there any contention, that it is the purpose of the National Association for the Advancement of Colored People to overthrow the government by force and violence or to engage in any other form of criminal conduct. The organization [has engaged in many activities] . . . the results of which have been very unpopular in some sections. . . . The fact that organizations may render themselves unpopular with the majority in a community is no reason why the majority may use its power to enact legislation denying to their members the fundamental rights of constitutional liberty.

148 F. Supp. at 569.

A dissent by district Judge Timmerman, disagreeing with Chief Judge Parker, also contains some remarkable language applicable

appellants on the lower court's determination that the full disclosure requirements of Act 10 violated their First Amendment associational rights.

Justice Stewart, for the Court, reaffirmed *Adler* in the limited context of the state's power to make in-

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to arguments made in support of the Calhoun County policy. After complaining that "the Bible has been ruled out of the public schools," and citing *Adler* for the proposition that the findings of fact by the legislature concerning the NAACP clearly have a "rational basis," he noted that "[i]ndeed, if the statute has any bearing on constitutional liberties, it protects [as the policy in issue here protects the unitary school] rather than limits them. The statute is designed to protect young minds from the poisonous effects of NAACP propaganda." *Id.* at 581. Concluding:

> In the light of the other legislative findings, it also means that a state cannot rule out of its schools teachers who [allegedly like the petitioners herein] would sow the seed of discord and unrest, which if unimpeded, would blossom into outright strife. It also means that a state cannot keep out of its schools teachers who falsely represent the existence of a disparity in educational advantages among the races that in fact does not exist, and who would subject school children to teachings that are untrue. . . . The concluding finding in the statute is that the NAACP . . . "is so insiduous in its propaganda and the fostering of those ideas designed to produce a constant state of turmoil between the races, [as allegedly is Calhoun Academy vis-à-vis partial support by the Citizens Council] that membership in such an organization is wholly incompatable with the peace, tranquility and progress that all citizens have a right to enjoy."

Id. at 579.

During this time frame, a number of significant pre-*Pickering* and *Tinker* lower-court opinions struck down as unconstitutional the termination of qualified teachers on the basis of civil rights activities in circumstances similar to those presented by petitioners, *i.e.*, without a showing of substantial detriment to classroom performance. *See, e.g.*, Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966); Rackley v. School Dist. No. 5, 258 F. Supp. 676 (D.S.C. 1966); Williams v. Sumter School Dist. No. 2, 255 F. Supp. 397 (D.S.C. 1966).

quiries into the background of those who seek to teach."[37] *Shelton* v. *Tucker*, 364 U.S. 479, 485. Agreeing that there was a "substantial relevant correlation between the governmental interest asserted and the state's effort to compel disclosure," *id.*, the opinion continues by noting that teachers within the state had no tenure and that each school board had access to the information disclosed. From this the Court reasoned that the injury had an impermissible *in terrorem* effect on outside activities of the teachers since their continued employment depended upon the uninhibited discretion of their supervisors to renew their 1-year contract. *Id.* at 486. Specifically, there existed an implicit mandate "to avoid any ties which might displease those who control . . . professional destiny . . . ." *Id.*

The Court then turned to the obvious dragnet approach to ferreting out all associational activities of teachers which "could have no possible bearing upon the teacher's occupational competence or fitness," in-

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[37] This rather finalized interpretation of *Adler* obviously upholds that portion of the opinion relating to the government's right to make investigative inquiries to determine the competence and fitness of those whom it hires to teach in its schools. Petitioners do not take issue with this or the fact that under "limitations carefully observed" a state may inquire into an individual's affiliations and associations "as a preliminary to further inquiry into the nature of the association" in order to make a judgment about an applicant for admission into a particular profession, including, presumably, that of a public school teacher. Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 165-66; *cf.* Baird v. Arizona, 401 U.S. 1, 7 ("A state may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes."). This, of course, is not the nature of the policy at issue here, *i.e.*, utilization of the mere fact of a teacher's particular choice of education for his children as proof of "guilt by association" and a per se disqualification from public school teaching.

cluding protected NAACP membership. *Id.* at 488. Concluding in language adopted in *Elrod,* the Court stated:

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, *the purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.* The breach of legislative abridgement must be viewed in light of less drastic means for achieving the same basic purpose. [*Id.* at 488 (Emphasis added.)]

The NAACP experience goes to the heart of Judge Charles Clark's expressed constitutional distaste for the curtailment of a basic associational right on a record such as that in the instant case:

> Today's case is cast in the appealing garb of reinforcing public school desegregation by suppressing the right to educate one's child in a segregated private school. The problem is that the decisional principle it establishes applies to all forms of personal associations from the Ku Klux Klan to Black Panthers, and from membership in the Citizens Counsel to membership in the NAACP. Another such victory, bought at the expense of surrendering constitutionally protected rights to the expertise of psychological opinion, and we are undone. [511 F.2d at 757]

The "decisional principle" is obviously wrong. Absent evidence relating to adverse teaching consequences, NAACP members can and do teach, just as do members of the KKK, Black Panthers, and the Citizens Council. If these direct, personal associations are presumptively free from state abridgement, it should be

clear that no blanket, constitutional sanction can be given to dismissing teachers sending their children to private, segregated academies. In the words of Judge Charles Clark, the decision below must be reversed or "we are [all] undone." [38]

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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[38] Obviously there are also additional sound constitutional reasons for striking the policy. Having infringed a fundamental right, it is clear that the policy cannot withstand scrutiny under an Equal Protection analysis and the "compelling interest" test. Shapiro v. Thompson, 394 U.S. 618 (requiring utilization of the least "drastic means"). Incorporating an "irrebuttable presumption," *i.e.*, all teachers within the class have certain defined characteristics (which is certainly not the case), it is also subject to being struck as violative of Due Process under this Court's decision in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632. The policy is also an attempt to accomplish by indirection that which cannot be done directly. Pierce v. Society of Sisters, 268 U.S. 510, and Runyon v. McCrary, 44 U.S.L.W. 5034 (U.S. June 25, 1976), teach that the state may not preempt the educational process by requiring children to attend public schools.